

Complaint to the European Ombudsman

corporateeuropa.org



Submitted on 7 May 2014

→ Against which European Union (EU) institution or body do you wish to complain?

The European Commission.

→ What is the decision or matter about which you complain? When did you become aware of it?

This is a complaint about the European Commission's failure to properly implement the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC)ⁱ Article 5.3 and the accompanying guidelines.ⁱⁱ Article 5.3 states that decision-makers should "... act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law". It recognises the fundamental and irreconcilable conflict of interest between the tobacco industry and public health policy-making. It also recognises that the tobacco industry has, for decades, been working to delay, block, and weaken life-saving health measures, like those enshrined in the FCTC. The accompanying guidelines stipulate that decision-makers "should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products." The guidelines state that "where interactions with the tobacco industry are necessary, Parties should ensure that such interactions are conducted transparently". It has become clear that in the context of the preparations for the EU's Tobacco Products Directive a substantial number of undisclosed meetings between Commission officials and the tobacco industry have taken place and that only one Commission DG has rules and procedures in place to provide the required transparency around such meetings (DG SANCO). In responses to letters by Corporate Europe Observatory and other NGOs about this issue (most recently a letter by European Commissioner Maroš Šefčovič dated 19 February 2014), the European Commission claims its approach is "compatible" with the FCTC's Article 5.3 and the accompanying guidelines, while in fact the Commission has failed to take serious measures to implement its UN obligations on this issue. In his letter, Commissioner Šefčovič even claims "that the WHO guidelines are applied in full in the Commission". Comparing the guidelines with the Commission's practices shows that this is simply untrue.

The controversy around tobacco industry attempts to influence the EU's Tobacco Products Directive, the scandal surrounding the resignation of Mr. Dalli, and the problematic re-appointment in December 2012 of Mr. Petite to the Ad Hoc Ethical Committee, have highlighted the importance of effectively regulating the relations between EU institutions and the tobacco industry. The EU and its member states have all ratified the convention which entered into force eight years ago. As a Party to the FCTC, the EU institutions have an obligation to protect policy-making and law-making from the vested interests of the tobacco industry. Article 5.3 and the accompanying guidelines should be properly implemented, which is currently not the case.

→ What do you consider that the EU institution or body has done wrong?

The European Commission has failed to properly implement Article 5.3 and the accompanying guidelines of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

During the last years, European Commission officials have had numerous meetings with tobacco industry lobbyists that were not disclosed online, despite the obligation for transparency. This became clear from the European Commission's responses to questions from MEPs and from documents released under 1049/2001 requests. This includes at least 14 undisclosed meetings involving top Commission officials, including from the European Commission's Secretariat-General and members of Commission President Barroso's cabinet.ⁱⁱⁱ These meetings (see appendix) behind closed doors without any transparency for the public (such as online listing and the publication of minutes) constitutes a serious violation of the FCTC.

Since 2011, as part of implementing FCTC Article 5.3, DG SANCO lists the meetings it has with tobacco industry representatives and publishes the minutes of these meetings online^{iv} (although our research shows there were meetings missing in the list).^v However, Commission President Barroso's cabinet, the Secretariat-General and other Commission departments currently do not follow this example and fail to provide transparency around meetings with the tobacco industry and those working to further the tobacco industry's interests.

The matter was of major importance not only because of ongoing tobacco industry lobbying attempting to weaken the EU's Tobacco Products Directive, but also because the European Commission was arguing that Health Commissioner Dalli was forced to resign due to violating the FCTC (by not disclosing one or more meetings with tobacco lobbyists).^{vi} If this was the basis for the resignation of a Commissioner, one would expect the Commission to have an ambitious policy for implementation and enforcement of these UN rules, which turned out not to be the case at all.

In late 2012 a DG SANCO spokesperson replied to a question from Corporate Europe Observatory about whether DG SANCO's transparency policy was applied elsewhere in the Commission as well: "We have no precise knowledge to which extent other Commission services follow the same practice."^{vii} A look at the websites of other DGs showed that DG SANCO was indeed the only one which showed any signs of implementing a transparency policy. The Commission's lax approach to the WHO Convention is reflected in the fact that there is no document anywhere on the Commission's website outlining how it intends to implement the WHO rules. A DG SANCO spokesperson argued: "In fact, we do not need a Commission internal document on how to implement Art. 5(3) because – read together with its guidelines – Art. 5(3) is self-explanatory." The guidelines to Article 5.3 recommend developing clear rules for implementation of the article and even DG SANCO itself does not have a flawless record on implementation of the UN obligations (let alone the rest of the Commission).

In January 2013, we wrote (together with the ALTER-EU coalition and several other NGOs) to Commission President Barroso to "express our concerns about the failure of the European Commission to properly implement Article 5.3 "^{viii} We urged Mr. Barroso to

"ensure that the Commission fulfils its UN obligations and implements the FCTC's Article 5.3", stressing that "this, among other things, requires changes to the Code of Conduct for Commissioners, the Staff Regulations and the Transparency Register."

In a reply dated 7 February 2013, Secretary General Catherine Day states that "the Commission is strongly committed to complying with the EU's international commitments in this regard and is confident that the EU and the Commission in particular have well established rules for that purpose." Catherine Day argued that "the Commission's ethical framework, the existing rules and tools concerning transparency and lobbying, and the policy in terms of stakeholder consultations are fully compatible with these non-binding guidelines." Claiming that the approach is "fully compatible" is absurd. Not only are undisclosed meetings with the tobacco industry at odds with Article 5.3 and the guidelines, also a large number of other specific recommendations in the guidelines are not followed at all.

Ms. Day stated that the guidelines "are not binding", but "that Parties are encouraged to follow them to the extent possible, in accordance with their national law." This is an empty statement and Day does not explain why it would not be possible for the Commission to properly implement the guidelines.

Ms. Day continued claiming that releasing documents that were requested under Regulation 1049/2001 (freedom of information) is sufficient to fulfil the WHO transparency obligations. This reactive and restrictive approach is neither sufficient nor compatible with the FCTC Article 5.3 guidelines. Rather than the Commission ensuring that the information is openly available to the public, it places the burden on the public to act (in response concerns about undue influence, following scandals like the Dalli case, etc.), by requesting access to relevant documents. Moreover, the disclosure of meetings with the tobacco industry happened in an incomplete manner with documents about some meetings being released to CEO and other NGOs (with different documents being released in response to different access requests on the same topic), while other meetings only became known through Commission responses to questions from MEPs. Catherine Day fails to explain why only DG SANCO has a policy of pro-active transparency around its contacts with tobacco lobbyists and the rest of the European Commission does not. Other parts of the Commission (including Catherine Day's own Secretariat-General) were heavily involved in the decision-making on the Tobacco Products Directive, as internal Commission documents have shown very clearly.^{ix} Officials from Secretariat-General and Barroso's cabinet were in regular contact with tobacco industry lobbyists attempts as well, including email correspondence, phone calls and meetings. Failing to provide transparency around these contacts as well as failing to take other measures to avoid undue tobacco industry influence is not compatible with the UNFCTC Article 5.3 and its guidelines.

During 2013, Ms. Day repeated her line of argument at several other occasions, for instance at a hearing in the European Parliament's budgetary control committee.^x In December 2013, we wrote to Commissioner Maroš Šefčovič, following statements made by the Commissioner in a hearing in the European Parliament giving the impression that the Commission had introduced new measures to implement its obligations under the UNFCTC.^{xi} During a hearing of the Parliament's budgetary control committee, Maroš Šefčovič stated that the WHO rules are "quite clear", that meetings with tobacco lobbyists can only happen when these are in public and when mentioned on the website,

and that this practice is already adopted by the Commission.^{xii} Šefčovič also mentioned that there are additional rules which he would make sure are implemented. We wrote to Maroš Šefčovič stating that we agree with this interpretation of the rules, but that (with the exception of DG SANCO) Commission departments that meet with tobacco lobbyists fail to disclose these meetings.^{xiii} We asked Šefčovič if the Commission has introduced new measures to implement the WHO rules, ensuring that all meetings with the tobacco industry will be disclosed on the Commission website, mentioning that we had not been able to identify any changes to the Commission website in this respect. On the issue of the additional rules that are to be implemented, Article 5.3 and the accompanying guidelines indeed require the introduction of specific ethics rules for Commissioners and Commission officials regarding their relations with the tobacco industry. We asked Šefčovič if the Commission had taken any new steps in this direction and referred to the examples of such measures that were outlined in the ALTER-EU letter.^{xiv}

In a response dated 19 February, Šefčovič implies that there has been no change in the Commission's approach.^{xv} He confirms that "the FCTC and its provision and principles should [...] be respected by all European institutions". Large parts of Šefčovič's letter are copy-pasted from the response by Catherine Day a year before,^{xvi} but there were also some additional elements added. He mentions "the recent amendments of the Staff Regulations in the area of conflicts of interest which have to be implemented by all institutions as of 1 January 2014 and the guidelines on gifts and hospitalities which the Commission issued to its staff in 2012" and states that "all ethical rules have been recalled to staff in the so called ethics week in November last year." "Therefore, the Commission considers that the WHO guidelines are applied in full in the Commission", Šefčovič writes. We strongly disagree with this statement. There are no rules specifically for the tobacco industry and even the most basic measure of securing transparency around all meetings with the tobacco industry is not implemented. The Commission's approach is not compatible with the WHO guidelines, let alone that they are applied in full.

Šefčovič also mentions that "the Directorate General responsible for health and consumers (SANCO) has developed specific guidelines for its staff, which is understandable given its responsibility for the Tobacco Products Directive. During and around the Commission's ethics week last November, DG SANCO provided training on ethical issues including on dealing with lobbyists. I applied a similar approach when I was for a short period of time acting as commissioner in charge of health issues and I continue to apply this approach and publish minutes of the meeting whenever I have contacts with the tobacco industry. However, this in no way implies any contradiction or incoherence with the general framework applicable to all services. The WHO guidelines indeed recommend adaptation to specific circumstances: "while the measures recommended in these guidelines should be applied by Parties as broadly as necessary [...] Parties are strongly urged to implement measures beyond those recommended in these guidelines when adapting them to their specific circumstances".

This last quote misses the point. DG SANCO does not go beyond the guidelines, but at least partially implements them. The rest of the European Commission fails to even come close to implementing the measures recommended in the guidelines. There is a clear and unjustified incoherence between DG SANCO's approach and that of the rest of the Commission. All Commission officials involved in decision-making on public health and tobacco control should be subject to rules that are truly compatible with the WHO

guidelines, including the Secretariat-General and Barroso's cabinet. It is, moreover, questionable whether "SANCO has developed specific guidelines for its staff" (CEO was informed that there are no such guidelines because Article 5.3 is "self-explanatory").

Regarding Commissioner Šefčovič's policy of disclosing meetings with the tobacco industry, this is obviously very welcome but in practice it is not implemented in a way that secures meaningful transparency. His online diary appears to only go back six-eight weeks in time; meetings that happened before this time period simply 'disappear' from the online diary. When we visited Šefčovič's online diary in March we found one meeting with the tobacco industry disclosed. When we visited the website in late April, this meeting was no longer listed.^{xvii}

The WHO has recently produced a document highlighting examples of implementation of Article 5.3, in which the Commission is not even mentioned. The examples listed in the document shows that the Commission is currently doing less than countries as diverse as Brazil, Bulgaria, the Netherlands, the Philippines, the UK and Swaziland, to mention a few examples.^{xviii}

→ **What, in your view, should the institution or body do to put things right?**

The Commission's current rules and procurements are not sufficient to ensure transparency and avoiding undue influence when interacting with tobacco industry interests. The Commission should (across all Commission DGs) introduce effective measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur. This starts with publishing online lists of all meetings it has with tobacco industry representatives as well as the minutes of these meetings. This would ideally happen per DG, with an easy overview being available via the European Commission's Transparency Portal. In addition to the obligation to ensure transparency around meetings with tobacco industry representatives, many other parts of the FCTC Article 5.3 guidelines appear not to be implemented. Also the case of Michel Petite's membership (and chairmanship) of the Commission's ad-hoc ethical committee (despite working as a law firm lobbyist for industry clients including Philip Morris) shows the Commission needs clear rules to fulfill its UN obligations. The Commission should undertake a thorough assessment of how to ambitiously implement these important UN rules (ideally also assessing whether the lax implementation so far may have resulted in undue tobacco industry influence). This should include a clear document outlining in writing how it intends to implement the WHO rules across all Commission departments, something that currently appears not to exist.

Action is needed on the following and other points:^{xxix}

- Implementing a code of conduct on relations with the tobacco industry (the Commission has not initiated a separate code - or any other written rules - for relations with the tobacco industry and neither the Code of Conduct for Commissioners nor the Staff Regulations mention the tobacco industry)
- Ensuring registration and disclosure of tobacco industry lobbyists (the voluntary nature of the EU's Transparency register, and its limited disclosure requirements, means that many tobacco lobbyists remain unregistered and that those who are registered do not provide comprehensive disclosure of lobbying activities).
- the guidelines highlight the need for measures to "avoid the perception of partnership

with the tobacco industry", preventing conflicts of interest, closing the revolving door and many other important points. Also the need for an enforcement mechanism and for a whistle-blower function is stressed.

→ Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes. We have questioned the Commission's approach on numerous occasions, including in open letters on 17 January 2013 (ALTER-EU letter to Commission President Barroso) and on 11 December 2013 (to European Commissioner Maroš Šefčovič).

Appendix: Examples of undisclosed meetings between European Commission officials and tobacco industry representatives

- 1) Ms Klingbeil and Mr Watson (of the European Commission's Secretariat-General) met Messrs Lefranc and Doms (Philip Morris International) on 3 May 2010.^{xx}
- 2) Mr Watson met again with Mr Lefranc on 15 June 2010 and received a phone call from Mr Lefranc on 9 June 2010.^{xxi}
- 3 & 4) Mr Nymand-Christensen (Secretariat-General) met former MEP Ms Riis-Jørgensen and Ms Kindstrand-Isaksson from Swedish Match on 16 March 2011 and on 6 March 2012.^{xxii}
- 5) On 10 June 2011, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President, attended a meeting with Mr Klaus and Philip Morris (Messrs Doms and Wenning).^{xxiii}
- 6) On 20 December 2011, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President attended a meeting between Mr Klaus and the cigarette industry (Mr. Peter Wörmann Vorsitzender BdZ (Bundesverband der Zigarrenindustrie), Marcel Crijnen Geschäftsführer ECMA (europäischer Zigarrenverband); Bodo Mehrlein Geschäftsführer BdZ (Bundesverband der Zigarrenindustrie)).^{xxiv}
- 7) On 27 March 2012, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President attended a meeting between Mr Klaus and Ms Delfosse from ESTOC (European Smokeless Tobacco Council) and Spyros Pappas, an unregistered lawyer/lobbyist working for ESTOC.^{xxv}
- 8) On 4 May 2012 Marianne Klingbeil (Secretariat General) and John Watson (Secretariat General) had "a short meeting with Philip Morris (Antoine Lefranc and Kristóf Doms)" As John Watson remarks in his short email note, "Marianne had met AL recently at a conference in London and he asked to meet her here."^{xxvi}
- 9) On 15 June 2012 John Watson (Secretariat General) "met Antoine Lefranc for coffee." In his short email note, Watson writes: "No new elements although he gave me some documents which I will pass on Helen. He will write to the DGs of Trade and Sanco."^{xxvii}
- 10) On 18 September 2012 Cecilia Kindstrand-Isaksson (Swedish Match) and Johan Gabrielsson (Swedish Match) had a meeting with William Sleath (Secretariat General), Jean Ferriere (Sec Gen) and Antti Maunu (SANCO) to explain their views "on the current situation regarding snus and what we see as a logical step to take in the future, that is a regulation for all smokefree tobacco products in the EU".^{xxviii}
- 11) 21 June 2012 Clara Martinez Alberola (Cab Barroso) met with Spyros Pappas (an unregistered lawyer/lobbyist – Pappas & Associates) and Patrick Hildingson (ESTOC).^{xxix}
- 12, 13 & 14) Two brief conversations took place between Legal Service officials and Mr Michel Petite (former Director- General of the Legal Service until 2007, and now an Avocat in Paris).^{xxx} The conversations were with Mr Patrick Hetsch in September 2011, and with Mr Marc Van Hoof in September 2012. Mr Petite mentioned that his law firm provided

legal advice to a tobacco company (Philip Morris International) and set out his views on some legal issues of tobacco legislation. After having been informed about these conversations, Director- General Luis Romero asked to be personally updated by Mr Petite of his legal counsel activities in this area. That meeting took place on 14 November 2012.

Documents released by the European Commission following requests for access to documents show that there has been extensive correspondence between Commission officials and tobacco industry lobbyists about additional meetings and that some other undisclosed meetings may have taken place. Some meetings were agreed, the correspondence shows, but it is unclear if they happened. An example is the request for a meeting with Michael Gremminger (Secretariat General), sent 18 June 2012 by Patrick Hildingson, chairman of ESTOC. Gremminger answered positively (18 June 2012).^{xxxii} The request was reconfirmed by Hildingson on 19 June, but it is unclear if the meeting took place. Another example is the invitation for a Philip Morris lobby event in Hotel Stanhope on 30 June 2011, sent by Kristof Doms (PMI) on 14 June 2011.^{xxxiii} It is unclear if this invitation was accepted.

The Commission also turned down some requests for meetings. An example is the request for a meeting with Catherine Klingbeil (Secretariat General), sent 21 May 2012 by Kristof Doms (PMI). In his letter Doms writes: "We have shared specific views with DG SANCO (Unit D4) on 8 March 2012, as well as with the Cabinets of Commissioners Tajani and Geoghegan-Quinn, and we would welcome the opportunity to share our thoughts with you directly." Klingbeil declines 25 June 2012.^{xxxiv}

i <http://www.who.int/fctc/en/>

ii http://www.who.int/fctc/guidelines/adopted/article_5_3/en/

iii The real number of undisclosed meetings is likely to have been much higher than 12. CEO's requests for access to documents focused on DG SANCO, Secretariat-General and Barroso's Cabinet. As the appendix to this complaint shows, Philip Morris also indicates to have had meetings the Cabinets of Commissioners Tajani and Geoghegan-Quinn.

iv DG Sanco publishes a list of "Meetings on TPD revision" (with links to minutes)

http://ec.europa.eu/health/tobacco/events/index_en.htm#anchor3

v Meetings with tobacco lobbies missing from DG SANCO's website: 3 March 2010 (British American Tobacco), 26 January 2010 (CECCM) and 24 October 2008 (CECCM). See "The Commission's shabby implementation of UN rules for tobacco lobbying": <http://corporateeurope.org/news/commission-shabby-implementation-un-rules-tobacco-lobbying>

vi "According to sources, the infraction for which Dalli was made to resign hinges on an article in the World Health Organisation's Framework Convention on Tobacco Control, to which the EU is a signatory", the European Voice wrote on 31 October 2012; <http://www.europeanvoice.com/article/imported/how-barroso-and-olaf-messed-up-dalli-s-exit/75558.aspx?LG=1>

vii See "The Commission's shabby implementation of UN rules for tobacco lobbying":

<http://corporateeurope.org/news/commission-shabby-implementation-un-rules-tobacco-lobbying>

viii Letter to Commission President Barroso, 17 January 2013 (ALTER-EU, jointly with Corporate Accountability International, European Public Health Alliance and Smoke-Free Partnership) <http://www.alter-eu.org/sites/default/files/documents/Letter%20to%20President%20Barroso%20on%20WHO%20FCTC%205.3%20%282%29.pdf>

ix See for instance the letter from Paola Testori Coggi to Catherine Day of September 12 2012:

<http://www.asktheeu.org/en/request/315/response/1035/attach/html/5/Hoedeman%202012%20243%20246%20annex.pdf.pdf.html>

x For instance the hearing of the budget control committee on 21-22 January 2013.

xi http://corporateeurope.org/sites/default/files/letter_to_commissioner_sefcovic_re_unfctc_article_5.3.pdf

xii European Parliament's Committee on Budgetary Control, Committee meeting, December 2 2013.

<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20131202-1500-COMMITTEE-CONT#managehelp>

xiii http://corporateeurope.org/sites/default/files/letter_to_commissioner_sefcovic_re_unfctc_article_5.3.pdf

xiv Letter to Commission President Barroso, 17 January 2013 (ALTER-EU, jointly with Corporate Accountability International, European Public Health Alliance and Smoke-Free Partnership) <http://www.alter-eu.org/sites/default/files/documents/Letter%20to%20President%20Barroso%20on%20WHO%20FCTC%205.3%20%282%29.pdf>

xv http://corporateeurope.org/sites/default/files/ares_424089.pdf

xvi Commissioner Šefčovič writes (as did Ms. Day) that "the Commission is strongly committed to complying with the EU's international commitments in this regard and is confident that the EU and the Commission in particular have well established rules for that purpose". Šefčovič also writes, in wording virtually identical to Day's that "the ethical framework applicable to Members of the Commission and staff, and the Commission's rules and instruments concerning transparency and lobbying, are fully compatible with these non-binding guidelines".

xvii http://ec.europa.eu/commission_2010-2014/sefcovic/diary/index_en.htm

xviii "Examples of implementation of Article 5.3 communicated through the reports of the Parties",

http://www.who.int/fctc/parties_experiences/en/

xix The guidelines also require, for instance, the Commission to inform all its branches and the public about "the addictive and harmful nature of tobacco products", the "strategies and tactics used by the tobacco industry to interfere with the setting and implementation of public health policies" and to "raise awareness about the tobacco industry's practice of using individuals, front groups and affiliated organizations to act, openly or covertly, on their behalf".

xx See "The Commission's shabby implementation of UN rules for tobacco lobbying":

<http://corporateeurope.org/news/commission-shabby-implementation-un-rules-tobacco-lobbying>

xxi See "The Commission's shabby implementation of UN rules for tobacco lobbying":

<http://corporateeurope.org/news/commission-shabby-implementation-un-rules-tobacco-lobbying>

xxii European Commission replies to the questionnaire from the Committee on Budgetary Control of the European Parliament concerning the resignation of the former Commissioner John Dalli, pages 35 and 36:

http://www.ehrenhauser.at/assets/FINAL_COM-and-OLAF-reply-to-questionnaire-30-NOV-fin.pdf

xxiii See "The Commission's shabby implementation of UN rules for tobacco lobbying":

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xxvi See "2012 4873 2 annexes 1 5" http://www.asktheeu.org/en/request/ec_secretariat_general_contacts

xxvii See "2012 4873 2 annexes 1 5" http://www.asktheeu.org/en/request/ec_secretariat_general_contacts

xxviii See "The Commission's shabby implementation of UN rules for tobacco lobbying":

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xxix See "The Commission's shabby implementation of UN rules for tobacco lobbying":

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XXX European Commission replies to the questionnaire from the Committee on Budgetary Control of the European Parliament concerning the resignation of the former Commissioner John Dalli, pages 35 and 36:
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xxxii See "2012 4873 2 annexes 18 19" http://www.asktheeu.org/en/request/ec_secretariat_general_contacts

xxxii See "2012 4873 2 annex 13" http://www.asktheeu.org/en/request/ec_secretariat_general_contacts

xxxiii See "2012 4873 2 annexes 16 17" http://www.asktheeu.org/en/request/ec_secretariat_general_contacts